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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

O.S.C. Company,
Petitioner

v.

Edward G. Zymblosky, Jr., et al.,
Respondents

On Petition For Writ Of Certiorari
To The Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether state court denies a party equal protection of law when it withholds the application of established case law and particularly uses an internal operating procedure to apply the law differently to the Petitioner than any other person and to limit the import and effect of an unpublished decision solely to the Petitioner.

II. Whether the state courts of Pennsylvania may strike deeds to property and order reconveyance without providing due process of law.

PARTIES TO THE PROCEEDING

Petitioner is the O.S.C. Company, a partnership which owns property formerly used by a now defunct railroad, including land upon which Respondents situated a portion of their junk yard.

Respondents are Edward G. Zymbloski, Jr., Gail Zymbloski, and Edward G. Zymbloski, Jr., t/a Boots & Hanks 24-Hour Towing and Wrecking Service, the proprietors of a junk yard that used and continue to use Petitioners' land as part of their junk yard.

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Petitioner respectfully seek a writ of certiorari to the Pennsylvania Supreme Court.

OPINION AND JUDGMENT BELOW

The order of the Pennsylvania Supreme Court denying Petitioner's Petition for Allowance of Appeal is unreported and is reprinted in the Appendix to this Petition as Appendix A. The decision of the Pennsylvania Superior Court which denied Petitioners appeal is unreported and is reprinted in the Appendix to this Petition as Appendix B. The decision of the Lackawanna

County Court of Common Pleas, which initially violated Petitioner's right to due process and equal protection is unreported and is reprinted in the Appendix to this Petition as Appendix C.

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal on April 26, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

FEDERAL STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the 14th amendment to the U.S. Constitution prohibits state governments from denying any person within its jurisdiction the equal protection of the laws. The 14th Amendment states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

The Due Process Clause of the 14th Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law . . .". U.S. Const. Amend. XIV.

INTRODUCTION

The Fourteenth Amendment to the United States Constitution provides that state governments and their judicial systems afford due process of law and equal protection of the laws to its citizens. In this case, the Pennsylvania Courts deprived Petitioner of its property by ordering Petitioner to transfer title to its property to the Respondents without a trial by jury, a full hearing or opportunity for any hearing, and withheld the application of established case law. In rendering its unreported decision, the state appellate court made use of No. 37 of its Internal Operating Procedures (210 Pa. Code. Section 65.37), which allowed that court to apply the law differently to the Petitioner than as to any other similarly situated person and to limit the import and effect of its decision solely to the Petitioner.[1]

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1 Section 37 of the Internal Operating Procedures of the Superior Court of Pennsylvania which governs the Superior Court's practice and procedure reads as follows: § 65.37. Unpublished Memoranda Decisions

A. An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, res judicata, or collateral estoppel, and (2) when the memorandum is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding. When an unpublished memorandum is relied upon pursuant to this rule, a copy of the memorandum must be furnished to the other party to the Court.

B. After an unpublished memorandum decision has been filed, the panel may sua sponte, or on the motion of any party to the appeal, or on request by the trial judge, convert the memorandum to a published opinion. In the case of a motion of any party to the appeal or a request from the trial judge, such motion or request must be filed with the Prothonotary within 14 days after the entry of

STATEMENT OF THE CASE

The instant Petition for Writ of Certiorari emanates from the Lackawanna County Court of Common Pleas issued in 97-CIV-3990. This order circumvented established case law and struck the deeds which Petitioner acquired at sheriff's sale to land which was formerly owned by Respondents all without a trial by jury, full hearing or an opportunity for a hearing. The Petitioners timely appealed the June 20, 2003 Order to the Pennsylvania Superior Court. The appeal was docketed to 1021 MDA 2003. On May 25, 2004, the Superior Court issued its non-precedential decision (unpublished memorandum) which adopted the lower state court decision as its own and affirmed the June 20, 2003 Order. "[w]e conclude that the trial court's thorough and thoughtful decision correctly disposes of Appellant's issues on appeal." Id.

In civil action 97-CIV-3990 (Lacka. Cty.) the Petitioner sued Respondents for trespass and damages caused by Respondents unpermitted use of Petitioner's land as part of the Respondents' junk yard operation. After years of Respondents ignoring Petitioner's written demands to cease the continuing trespass, Petitioner filed a trespass action. During the course of the at law action, Respondents admitted trespassing on the Petitioner's land for at least a period of 13 years. On December 22, 2000, the lower court awarded Petitioner damages of $6,500.00 per year for each year of Respondents' trespass upon the Petitioner's land. Respondents filed exceptions to the lower court's December 22, 2000 decision which were denied by the

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judgment or other order involved. The decision to publish is solely within the discretion of the panel.

lower court by Order dated January 11, 2001. This Order was entered on the record a judgment in Petitioner's favor for trespass and against the Respondents and awarded Petitioner damages in the amount of $6,500.00 per year or $541.66 per month. The entered judgment Order states in pertinent part:

> "2. Judgment entered in favor of Plaintiff and against the Defendant with regard to Defendant's trespass upon Plaintiff's right of way without any authorization of the Plaintiff; and
>
> 3. Judgment is entered in favor of the Plaintiff and against the Defendants for fair rental damages of $6,500.00 per year, or $541.66 per month."

(Lower court's decision of January 11, 2001, See Appendix C).

On January 12, 2001, Petitioner filed a post-trial motion with the lower court to confirm the January 11, 2001 Order. The lower court failed to act on the post-trial motion within thirty days[2]. Petitioner then calculated the trespass damages awarded by the lower court by multiplying the number of years that the court found that Respondents had trespassed by the amount of money that the lower court determined to be fair monthly damages plus legal interest. Eight months later, on August 3, 2001, Petitioner filed with the lower court, a praecipe for writ of execution in the amount of $184,349.26 and an affidavit pursuant to Pa.R.C.P. Rule 3129. The amount set forth in the Praecipe for Writ of

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2 It was not until January 8, 2002, that the lower court finally acted on Petitioner's motion for post trial relief, 361 days after Petitioner had filed its post-trial motion on January 12, 2001 and also after the Superior Court dismissed Respondents' appeal on June 11, 2001. The lower court's decisions of December 22, 2000 and January 11, 2001 became final on June 11, 2001.

Execution represented the amount of trespass damages with interest calculated by Petitioner in good faith reliance on the lower court's findings of fact and final Orders of December 22, 2000 and January 11, 2001. Respondents did not object to the amount set forth in Petitioner's writ of execution, nor did Respondents ever move to strike the writ after its service.

After a series of delays, on May 14, 2002, promptly at 10:00 AM, the Sheriff of Lackawanna County conducted a sheriff's sale of Respondents' parcels of land. The sale of the Respondents' parcels concluded with Petitioner as the high bidder with the bid of $23,000.00.

Subsequent to the May 14, 2002 Sheriff's Sale, the solicitor prepared a sheriff's deed for the former Respondents parcels transferring title to the parcels to the Petitioner. The Sheriff of Lackawanna County executed the deed on July 17, 2002, and filed it in the office of the Recorder of Deeds on July 18, 2002. This action concluded the legal transfer of property to the Petitioner.

The Respondents did not take timely action under Pa.R.C.P. Rule 3132 to set aside the May 14, 2002 sheriff's sale prior to the sheriff's delivery on July 18, 2002 of its deed to Petitioner. In fact, counsel for Respondents took no timely action to invalidate the sheriff's sale.

On August 9, 2002, Respondents filed to the at law action docketed to 97-CIV-3990 a Rule to Show Cause Why Deeds Issued by Sheriff of Lackawanna County Should Not Be Revoked, despite the fact that 97-CIV-3990 was concluded on June 11, 2001 when the Superior Court dismissed Respondents' appeal of the lower state court's January 11, 2001 order. Then, five weeks later, on September 12, 2002, Respondents began an equity action docketed to 60052-EQ-2002 (Lacka. Cty.), alleging, *inter alia*, that Respondents had no adequate remedy at law.

On June 20, 2003, at 11:07 AM, the lower court in 97-CIV-3990 issued its Order granting Respondents the requested at

law relief by striking the deeds Petitioner acquired at sheriff's sale based upon findings of fraud and lack of authority. No opportunity for hearing or trial at which testimony and evidence could be presented concerning allegations of fraud and lack of authority on the record was provided by the lower court, denying Petitioner basic due process. On June 20, 2003, at 1:51 PM, the lower court in 2002-EQ-60052 issued its order granting Respondents equitable relief nearly identical to the at law relief granted earlier that same day in 97-CIV-3990. Both cases were appealed to the Superior Court. The Superior Court affirmed the lower court's decision in its "**Non-Precedential Decision - See Superior Court I.O.P. 65.37**". Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court which on April 26, 2005, declined to hear the case on appeal.

REASONS FOR GRANTING THE PETITION

This Court has not yet spoken on the constitutionality of the procedure for and use of unpublished memoranda decisions by the Pennsylvania Courts which, as the decisions are not published and do not set precedent, allow the courts to withhold the application of established case law and to apply the law differently to different parties.

I. Whether state court denies a party equal protection of law when it withholds the application of established case law and particularly uses an internal operating procedure to apply the law differently to the Petitioner than any other person and to limit the import and effect of an unpublished decision solely to the Petitioner.

The Equal Protection Clause of the 14th amendment to the U.S. Constitution prohibits state governments from denying any

person within its jurisdiction the equal protection of law. The 14th Amendment states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV. In Love v. Borough of Stroudsburg, the Pennsylvania Supreme Court stated: "The equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution." Love v. Borough of Stroudsburg, 528 Pa. 320, 325, 597 A.2d 1137, 1139 (1991) (Citations omitted). The interest at issue is the Petitioner's title to land acquired at an uncontested sheriff's sale; title is further evidenced by duly executed and filed sheriff's deed. The equal protection clause is intended to provide "equal application" of the laws to all citizens. It requires that the laws of a state (including case law) must be applied equally and treat an individual in the same manner as others in similar conditions and circumstances.

In the instant matter, the state appellate court, the Pennsylvania Superior Court, denied Petitioner equal protection of law by withholding the application of established case law set down by the Pennsylvania Supreme and Superior Courts, and did so in an unconventional manner, i.e. an unpublished

memorandum decision pursuant to Superior Court Internal Operating Procedures Section 37 (210 Pa.Code § 65.37). The Superior Court is required to follow the case law established by the Pennsylvania Supreme Court. Com. v. Brown, 447 Pa. Super. 454, 669 A.2d 984 (Pa.Super. 1995), appeal granted 544 Pa. 677, 678 A.2d 367 affirmed 550 Pa. 580, 708 A.2d 81(function of Superior Court is limited to maintaining and effectuating laws established by the Pennsylvania Supreme Court); Foflygen v. Zemel, 420 Pa. Super. 18, 615 A.2d 1345 appeal denied 535 Pa. 619, 629 A.2d 1380 (1992)(the Superior Court, as our intermediate appellate court, is obligated to follow precedent set down by the Supreme Court, and is not free to disregard existing laws of the state and decisions of the Pennsylvania Supreme Court). In Malinder v. Jenkins Elevator and Mach. Co., 371 Pa. Super. 414, 538 A.2d 509 (Pa.Super. 1988), the Superior Court stated:

> "Where the Supreme Court has spoken on a particular subject, it is our obligation, as an intermediate appellate court, to follow and apply that decision so as to establish some measure of predictability and stability in our case law. In the absence of a legally relevant distinction between the facts of a previous case and the case before us, we are obliged to follow the dictates of the Supreme Court's decision in the prior case. Resolving cases by attempting to create irrelevant, factual distinctions impedes application of the doctrine of stare decisis, the principal function of which is to imbue the judicial system with some measure of predictability and stability, and places the development of the law in a constant, uncertain state of flux such that neither practioners nor trial judges can, with any degree

> of predictability, determine the proper application of the law to each new case involving similar facts that comes before them. It also is not our prerogative to apply different methods of analysis where our Supreme Court has made clear which particular analysis it believes should be applied to a particular situation."

Id. (For similar holdings see also Preiser v. Rosenzweig, 418 Pa. Super. 341, 614 A.2d 303, affirmed 538 Pa. 139; 646 A.2d 1166 (1992); Lilley v. Johns-Manville Corp., 408 Pa. Super. 83, 596 A.2d 203 (Pa.Super. 1991); Com. v. Jones, 388 Pa. Super. 22, 564 A.2d 983 (Pa.Super. 1989)).

To the extent that the Superior Court wished to overturn its own case law, and pursuant to its own internal operating procedures, it may do so only in a published opinion which would then be equally applicable to all citizens. In this case, the decision was wholly contrary to established and unquestioned precedential decisions, statutes, and principles of law.

The decisions of the Pennsylvania Superior Court and lower court withheld the application of voluminous amounts of established case law and clearly denied Petitioner equal protection of the laws and due process.

In Jackson v. Morter, the Pennsylvania Supreme Court determined a case with a fact pattern similar to that which was before the lower state court. In Jackson v. Morter, the real estate of Morter was sold at a sheriff's sale and Morter attempted to regain the title to the land in court by accusing the purchaser of fraud. The Pennsylvania Supreme Court determined that it was error to not have a trial by jury. The Pennsylvania Supreme Court stated:

> **"The question was as to the validity of the title acquired by the purchaser at sheriff's sale**....Where, however, the title of the purchaser has been fully confirmed, when the term has passed and the deed has been recorded and delivered, a different case is presented; all irregularities and minor defects have been waived or cured. **If want of power to sell, or gross fraud in the sale, is alleged, the purchaser has a right to trial by jury."**

Jackson v. Morter, 82 Pa. 291; 1876 Pa. LEXIS 229 (1876)(emphasis added).

In Washburn's Appeal, 105 Pa. 480, 1884 Pa.LEXIS 131 (1884), the Pennsylvania Supreme Court stated:

> "the testimony taken in behalf of the Plaintiff, was to the effect that he had purchased and was the owner in fee of the premises in dispute... **We cannot take from the respondent the right to have these questions of fact submitted to a jury**, according to the rules of law; to that mode of trial he is **entitled** under the **constitution**".

Washburn's Appeal, 105 Pa. 480, 1884 Pa. LEXIS 131 (1884)(Emphasis added).

In Evans v. Maury, the Pennsylvania Supreme Court found that a party whose title has been attacked should have the right to a jury. The Court said:

> "There is an allegation of fraud entirely dehors the

> record, by which a man's title to lands is sought to be wrestled from him. **Surely this should not be done excepting by the judgment of his peers and the law of the land.**"

Evans v. Maury, 3 A. 850 (Pa.1886) (Emphasis added)(See also Golder v. Bogash, 325 Pa. 449, 188 A. 837 (1937)(party accused of fraud has the right to trial by jury).

In York Ice v. Kearney, 344 Pa. 659, 25 A.2d 179 (1942), the Pennsylvania Supreme Court citing, Stewart's Appeal, 78 Pa. 88, held that Defendants in a case where a party attempts to have deeds cancelled in Court, have a right to trial by jury. The Court stated "(the Judge) considering a bill for a decree of cancellation of deeds for fraud, dismissed it on the ground that the right to the title evidenced by the deeds was triable at law with the **right to a jury trial of which the parties should not be deprived**..." York Ice v. Kearney, 344 Pa. 659, 25 A.2d 179 (1942)(citing Stewart's Appeal, 78 Pa. 88)(Emphasis added).

In 1978, the Pennsylvania Supreme Court yet again reaffirmed its prior decisions when it held, in Trachtenburg v. SIBARCO, 477 Pa. 517, 384 A.2d 1209 (1978), that a Defendant has a right to a jury trial at law when the issue is title to real property. The Pennsylvania Supreme Court stated "A defendant's **right to have a jury as the ultimate finder of fact.... is an important right not to be lightly regarded.**" Trachtenburg v. SIBARCO, 477 Pa. 517, 384 A.2d 1209 (1978) (Emphasis added).

Additionally, the procedure by which title to property may be challenged is clearly established by Pennsylvania case law. Beginning with Jackson and continuing through Evans, until the

present, the Pennsylvania Supreme Court consistently maintained that a court of common pleas could not deprive a party of title to land by a challenge initiated through the filing of a rule to show cause. Rather, a question of title to land must be resolved through the filing of an action in ejectment.

In Evans v. Maury, the Pennsylvania Supreme Court in a decision in a case with facts nearly identical to those which were before the lower state court and the appellate court, answered the question of whether a court has the ability to set aside a deed from a sheriff's sale by a rule to show cause where the acknowledgment, delivery and record of the Sheriff's Deed had already taken place. The Pennsylvania Supreme Court held that the Court of Common Pleas is without power to act by rule. The Evans Court stated:

> "We are in no doubt as to the proper rule. The delivery of the deed by the Sheriff after it has been properly acknowledged, the sale confirmed and the purchase money paid, vests the title in the purchaser. It is good title until it is proved that he procured it by a fraud upon the defendant in the execution. This raises a question of fact, involving in most instances, a conflict of testimony... In this form of proceedings the rights of the parties are strictly guarded, and the question of fraud passed upon by a jury....But it is a very great stretch of power, far greater than any chancellor ever exercised to dispose of such grave questions in a summary manner. **We cannot concede the power to any single judge of wrestling a man's title from him upon a rule to show cause**. And not only his title, but his reputation as well."

Evans, (Emphasis added).

The Pennsylvania Superior Court's decision in Petrovich Appeal, 155 Pa. Super. 138, 38 A.2d 709 (Pa.Super. 1944), adhered to and followed the precedent established by the Pennsylvania Supreme Court. The Petrovich Court reviewed a series of cases including Evans, *supra*,with precedential value that focused upon the attack on title to land initiated by a rule to show cause. The Superior Court stated:

> **"the lower court had no power in a summary proceeding, as upon a rule to show cause to set aside a sheriff's sale**, to compel a purchaser to surrender possession of the land and to deliver his deed therefor... " (Emphasis added).

Id.

It is well settled that mere misapplication of case law can not be shown to be an invidious discrimination. In Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed 2nd 98, reh denied 370 U.S. 965, 82 S.Ct. 1575, 8 L.Ed. 2nd 854 (1962), this Court stated: "[w]e have said time and again that of the Fourteenth Amendment does not 'assure uniformity of judicial decisions.... (or) immunity from judicial error...." Id. U.S. 556-557 (citing Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee 252 U.S. 100, 40 S.Ct. 306, 64 L.Ed 476 (1920). This Court went on to state "[w]ere it not otherwise, every alleged misapplication of state law would constitute a federal constitutional question." Id.

In Beck, the Petitioner argued that the State of Washington misapplied law and singled out the Petitioner for special treatment by denying him the procedural safeguards the law affords to others to insure an unbiased grand jury. Despite a finding that the grand jurors were lawfully selected and

instructed, and that no reported Washington State case law existed to support the Petitioner's argument, the Court determined that the "petitioner's argument here comes down to a contention that Washington law was misapplied." Id. Here, the inequality of constitutional proportion which surpasses misapplication of law, "uniformity of judicial decisions.... [or] immunity from judicial error." Beck supra., is the trial and appellate courts' withholding of the application of established case law, and the appellate court's use of Section 37 of its Internal Operating Procedures to apply law differently to the Petitioner than as to any other similarly situated person and to limit the import and effect of its decisions solely to the Petitioner.

This is not the case where there exists a divergence of opinion among Pennsylvania Supreme Court Justices and Pennsylvania Superior Court Judges or a particular matter involving civil or criminal law. Bishop v. Commonwealth of Pennsylvania, 634 F.2d 724 (3rd Cir. 1980). Nor is this a case where the Petitioner alleges state appellate inconsistency or lack of uniformity in judicial decisions as a basis for a claim of a due process violation. Beck, supra; Lavasek v. White, 339 F.2d 861 (10th Cir. 1965). Rather, and more importantly, this is a case where the Petitioner from inception argued that proper application of established case law as reported by the courts of the Commonwealth of Pennsylvania would provide the Petitioner with the procedural safeguards the law affords. Instead, the appellate state court affirmed the lower state court's decision to strip the Petitioner of title to real property without first affording the Petitioner due process and to withhold the equal protection by not applying the law. Under these circumstances, the action of the appellate court constitutes invidious discrimination and a denial of due process. Both in the at law and equity actions before the lower state court, and in each of the respective appeals to the Pennsylvania Superior Court, the application of established case law was withheld and the Petitioner's constitutional rights to due

process and equal protection were set aside through the selective use of Section 37 of the Superior Court's Internal Operating Procedures.

In the instant matter, the lower state court did not afford Petitioner a right to a trial by jury on the question of title to land and fraud, although, the lower state court found, on its own, that Petitioner committed fraud and that the sheriff lacked authority. The lower state court struck Petitioner's title to land and ordered the Petitioner's land to be re-titled to the Respondents. The net effect of the lower state court's action was to deny the Petitioner equal protection of law.

II. Whether the state courts of Pennsylvania may take property from a party without due process.

The Equal Protection Clause of the 14th amendment to the U.S. Constitution prohibits state governments from denying any person within its jurisdiction due process of law. The 14th Amendment states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV(Emphasis added).

In the instant matter, the lower state court divested Petitioner of title to land and refused to give Petitioner a hearing. This Court held that for land to be taken through adjudication, the minimum requirement is for a hearing. In Mullane v. Central Hanover Bank & Trust Co., this Honorable Court stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or **property by adjudication** be preceded by notice and **opportunity for hearing** appropriate to the nature of the case."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (Emphasis added). Therefore, as Petitioner's property was taken from them by an adjudication without an opportunity for a hearing before the lower state court, Petitioner was denied its right to due process.

CONCLUSION

The decision rendered by the lower state court, affirmed through the issuance under Section 37 of an unpublished memorandum decision of the state appellate court amounts to an arbitrary and capricious exercise of power in clear conflict with those fundamental principles of due process and equal protection which were established in our systems of jurisprudence for the protection and enforcement of private rights.

For the foregoing reasons, the Petition for Writ of

Certiorari should be granted.

Respectfully Submitted,

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(570) 344-3244

Counsel for Petitioner

July 25, 2005

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 841 MAL 2004

Petition for Allowance of Appeal From
The Order of the Superior Court

O.S.C. COMPANY,
Petitioner

v.

EDWARD G. ZYMBLOSKY, JR., AND GAIL ZYMBLOSKY, HIS WIFE, AND EDWARD G. ZYMBLOSKY, JR. T/A BOOTS & HANKS 24-HOUR TOWING AND WRECKING SERVICE,
Respondents

No. 814 MAL 2004

Petition for Allowance of Appeal From
The Order of the Superior Court

EDWARD G. ZYMBLOSKY, JR., AND GAIL ZYMBLOSKY, HIS WIFE, AND EDWARD G. ZYMBLOSKY, JR. T/A BOOTS & HANKS 24-HOUR TOWING AND WRECKING SERVICE,
Respondents

v.

O.S.C. COMPANY,

Petitioner

ORDER

PER CURIAM

AND NOW, THIS 26TH DAY OF April, 2005, the Petititions for Allowance of Appeal are hereby **DENIED**.

TRUE AND CORRECT COPY
ATTEST: April 26, 2005

/s/ Amy K. Swartz
Amy K. Swartz,
Appellate Court Clerk

J. A15009/04

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

In the Superior Court of Pennsylvania

No 1021 MDA 2003

EDWARD G. ZYMBLOSKY, JR., AND GAIL ZYMBLOSKY, HIS WIFE, AND EDWARD G. ZYMBLOSKY, JR. T/A BOOTS & HANKS 24-HOUR TOWING AND WRECKING SERVICE,
Appellees

v.

O.S.C. COMPANY,
Appellant

Appeal from the Order Entered June 20, 2003
In the Court of Common Pleas of Lackawanna County
Civil Division at No. 97-CIV-3990

BEFORE: BENDER, McCAFFERY and TAMILIA, JJ.

MEMORANDUM: FILED: May 25, 2004

Appellant, O.S.C. Company, appeals from an order dated June 20, 2003, granting Appellees' petition to set aside deeds issued by the sheriff of Lackawanna County on grounds of fraud and want of authority. After oral argument and review of the briefs and record, we affirm.

This case began with Appellant's filing of a civil action seeking damages from Appellees due to Appellees' use and encroachment upon Appellant's right-of-way. After a non-jury trial before the Honorable Terrence R. Nealon, an order was entered on December 22, 2000, in favor of Appellant, awarding Appellant fair rental damages in the amount of $6,500.00 per year. Appellant then filed a motion for clarification, asserting that it could not proceed to final judgment because it could not calculate Appellees' obligation, *i.e.*, the December 22, 2000 order did not state when the fair rental damages should have begun to accrue. Before Judge Nealon could act on the motion for clarification, Appellees filed an appeal to this Court, which was quashed because Appellees failed to file a brief.

On August 3, 2001, without resolution of its motion for clarification, Appellant filed a praecipe for writ of execution in the amount of $184,349.26. Appellees then filed a motion to stay the sheriff's sale and Judge Nealon held a hearing on January 4, 2002, at which time he considered both the motion to say and Appellant's motion for clarification. On January 8, 2002, Judge Nealon denied the motion to stay and held that the award of fair rental damages of $6,500.00 per year was to be prospective only, starting on December 22, 2000, the date of the trial court's initial order awarding damages to Appellant.

Appellant appealed this order to our Court on January 14, 2002. Approximately one year later on January 24, 2003, our Court affirmed Judge Nealon's order. **O.S.C. v. Zymblosky**, 819 A.2d 123 (Pa. Super. 2003) (unpublished memorandum) (**O.S.C. I**). While Appellant's appeal was pending in this Court, Appellees' proper was sold to Appellant by way of sheriff's sale based upon the writ of execution in the amount of $184,349.26. Appellees filed a petition to strike the sheriff's deeds on the basis of fraud or want of authority. Judge

Nealon, in considering Appellees' petition to strike the sheriff's deeds, concluded as follows:

> Instantly, a sheriff's sale was conducted on May 14, 2002, based upon a praecipe for writ of execution that was filed by O.S.C for an amount in excess of $180,000.00. The sheriff's sale on May 14, 2002, was predicated upon a retroactive award of damages which had never been issued by the court. In fact, more than four months prior to the sheriff's sale, this Court entered an order on January 7, 2002, granting O.S.C.'s motion for clarification and confirming that the damages were awarded prospectively from December 22, 2000, into the future. As a consequence, the Lackawanna County Sheriff either lacked the fundamental authority to make a sheriff's sale based upon a clearly erroneous judgment in excess of $180,000.00, or the sale was procured by fraud on the part of O.S.C. in misrepresenting the non-jury award as being retroactive rather than prospective.

Trial Court Order, 6/20/03, at 9. Thus, the trial court struck the sheriff's deeds on the grounds of fraud and want of authority. Appellant has again appealed to this Court, raising ten issues in its attempt to challenge Judge Nealon's decision striking the sheriff's deeds on grounds of fraud and want of authority.

Our standard of review in cases involving a petition to set aside a sheriff's sale is as follows:

> A petition to set aside a sheriff's sale invokes the equitable powers of a trial court. The

> burden of proof rests upon the proponent of the petition to show by clear and convincing evidence that the circumstances warrant relief. The trial court's ultimate disposition of the matter will not be disturbed upon review absent a finding of an abuse of discretion.

M&T Mortgage Corp. v. Keesler, 826 A.2d 877, 879, (Pa. Super. 2003). (Citing **Jefferson Bank v. Newton Assocs.**, 686 A.2d 834, 838, (Pa. Super. 1996).

We have carefully reviewed Appellant's issues pursuant to the standard of review set forth in **M&T Mortgage** and conclude that the trial court did not abuse its discretion and that clear and convincing evidence existed showing that the circumstances warranted relief. In its brief and at oral argument, Appellant has failed to offer any plausible explanation for the filing of a writ of execution in the amount of $184,349.26 when the judgment was for $6,500.00. The trial court's order, affirmed by this Court in **O.S.C. I**, clearly stated the fair rental damages were prospective only. There is no question that the judgment had no basis in the record. One must wonder how such any obvious error was not noticed by either the prothonotary or the sheriff. One further wonders how Appellant expected to proceed on the writ of execution in an amount over 28 times the judgment of record.

We have reviewed the briefs of the parties, the certified record, the applicable law, and the trial court's extensive order dated June 20, 2003. We conclude that the trial court's thorough and thoughtful decision correctly disposes of Appellant's issues on appeal. Therefore, having found no abuse of discretion on the part of the trial court, we adopt its

decision as our own. Accordingly, we affirm.

Additionally, we note that Appellant's Application to Strike Appellees' Brief or to Strike Certain References in Appellees' Brief and Appellees' Application to Suppress Appellant's Reply Brief are pending in conjunction with this appeal. In light of our resolution of the case, both applications are hereby denied.

Order affirmed. Pending applications denied.
Judgment Entered:

/s/David A. Szewczak
Prothonotary

Date: May 25, 2004

APPENDIX C

In the Court of Common Pleas of Lackawanna County

(Filed June 20, 2003)

No 97-CIV-3990

O.S.C. COMPANY,
Plaintiff

vs.

EDWARD G. ZYMBLOSKY, JR., AND GAIL ZYMBLOSKY, HIS WIFE, AND EDWARD G. ZYMBLOSKY, JR. T/A BOOTS & HANKS 24-HOUR TOWING AND WRECKING SERVICE,
Defendant

ORDER

Presently pending before this Court are the defendants' petition and rule to show cause why deeds issued by Sheriff of Lackawanna County should not be revoked which was filed by the defendants on August 9, 2002, and plaintiffs motion to strike the defendants' petition and rule to show cause which the plaintiff filed on January 17, 2003. Oral argument on the defendants' petition and rule to show cause and the plaintiff's motion to strike was conducted on April 23, 2003. In addition, the plaintiff later filed a petition to dismiss the defendants' rule, a petition to strike the defendants' supplemental brief, and a request for a rule absolute which were originally scheduled for

oral argument on June 13, 2003. However, the latter three filings were submitted on briefs and without the necessity of oral argument and all five submissions are now ripe for disposition.

By way of brief factual background, plaintiff O.S.C. Company ("O.S.C.") instituted this civil action against defendants Edward G. Zymblosky, Jr. and Gail Zymblosky, his wife, and Edward Zymblosky, Jr. t/a Boots & Hanks 24-Hour Towing and Wrecking Service ("Zymblosky") seeking damages for Zymblosky's use of and encroachment upon O.S.C.'s right-of-way. Zymblosky countered that he was not unlawfully using any O.S.C property since he had acquired ownership of the tract in dispute by adverse possession. Zymblosky alternatively argued that he was entitled to use the right-of-way since he possessed an easement by implication.

By non-jury decision dated December 22, 2000, we rejected Zymblosky's adverse possession claim due to his failure to establish, or even allege, that the use of the right-of-way by his predecessors in title was "hostile". We further held that Zymblosky had failed to demonstrate the necessary elements of either an easement by necessity or an easement by prescription. Based upon the credible and competent evidence submitted, we concluded that Zymblosky's predecessors in title had been granted an oral license to use the right-of-way by O.S.C.'s predecessor in title and that such license was automatically revoked by operation of law when O.S.C,., purchased the right-of-way. (*See* Dkt. Entry No. 16 pp. 6-10).

Consequently, we held that Zymblosky's continued use of the right-of-way constituted a trespass for which O.S.C. would be entitled to recover a fair rental value. (Id., at pp. 10-11.) Relying upon the expert opinion of the court-appointed

appraiser, we awarded future rental damages of $6,500.00 per year for Zymblosky's trespass upon O.S.C.'s right-of-way. (Id., at p. 13.) Zymblosky filed "Exceptions" to our decision which we denied by order dated January 10, 2001.

The labyrinthine procedural history of this case began on January 12, 2001, when O.S.C. filed a "Motion for Clarification" in which it averred:

> 5. This court's order decreed that [Zymblosky's] unauthorized use of [O.S.C.'s] right-of-way constituted a trespass for which fair rental damages is (*sic*) to be paid by [Zymblosky].
>
> 6. This court's decision and order does (*sic*) not state the date on which [Zymblosky's] obligation to pay the fair rental damages began as a result of the trespass. Without this date, [O.S.C.] is unable to calculate a sum certain.
>
> 7. Before [O.S.C.] can proceed to a final judgment based upon the aforementioned order, [O.S.C.] is obligated to calculate damages based on a sum certain.
>
> 8. After a review of this court's opinion and order of December 22, 2000, [O.S.C.] is unable to calculate [Zymblosky's] obligation to [O.S.C.].

(*See* Dkt Entry No. 22, ¶¶5-8.) In its post-trial motion, O.S.C. requested "an order clarifying the issue of the date upon which [Zymblosky's] obligation to pay fair rental damages to [O.S.C.]

began." (Id. p. 2.) Hence, by its own admission, O.S.C was, at a minimum, uncertain as to whether damages had been awarded prospectively or retrospectively, but was clearly aware of the fact that it could not "proceed to a final judgment based upon the aforementioned order" until it had first secured a date certain on which Zymblosky's obligation to pay rental damages began so that it could calculate a specific sum due.

Before O.S.C.'s motion for clarification became ripe for disposition, Zymblosky filed an appeal to the Superior Court on January 22, 2001. Despite the pendency of that appeal, O.S.C. filed a *lis pendens* on real estate owned by Zymblosky on April 26, 2001, based upon the non-jury verdict in this case. On May 23, 2001, Zymblosky secured a rule to show cause why the *lis pendens* should not be stricken, which rule was made returnable for an answer by June 29, 2001. In the interim, the Superior Court of Pennsylvania entered an order on June 18, 2001, quashing Zymblosky's appeal based upon his failure to file an appellate brief by May 7, 2001.

Following the Superior Court's quashal of Zymblosky's appeal, O.S.C. filed a "Petition for Supplementary Relief Under Pennsylvania R.C.P. Rule 3118" in which it averred that "[a]ll property owned by [Zymblosky][are (*sic*) subject to execution and sale to satisfy [O.S.C.'s] judgment. [O.S.C.'s] judgment, which includes rental and interest is $183,775.43." (*See* Petition for supplementary Relief, ¶9.) However, as of the date of the filing of said petition, no ruling had been made on O.S.C.'s motion for clarification which attested that O.S.C. could not proceed to judgment until the court had first identified the date on which Zymblosky's rental obligations commenced. Notwithstanding that fact, O.S.C.'s supplemental petition stated rental and interest damages totaling $183,775.43, which amount represents a retrospective rather

than a prospective assessment of rental damages.

Furthermore, even though O.S.C. had previously represented in its motion for clarification that it could not proceed to judgment until the court identified the date on which Zymblosky's rental obligation began, O.S.C. filed a praecipe for writ of execution on August 3, 2001, in which it inexplicably attested that the rental and interest damages due totaled $184,349.26. As a result, on November 9, 2001, Zymblosky presented a "Motion for Stay" seeking to stay any execution on sheriff's sale on the grounds that (1) O.S.C. could not execute on the non-jury award until Zymblosky's appeal was final and (2) O.S.C. could not proceed with execution until the court specified a definite amount of damages due. A rule to show cause was issued with the caveat that all proceedings would be stayed pending the disposition of Zymblosky's motion. On November 20, 2001, O.S.C. filed an answer to Zymblosky's motion and opposed any stay on the grounds that the Superior Court had already dismissed Zymblosky's appeal. A hearing on Zymblosky's motion for a stay was conducted before the undersigned on January 4, 2002.

At the time of the hearing on January 4, 2002, we became aware of the Superior Court quashal of Zymblosky's appeal such that this court was thereby vested with jurisdiction to decide O.S.C.'s motion for clarification. By order dated January 8, 2002, we denied Zymblosky's motion for a stay and granted O.S.C.'s motion for clarification. In that regard, we held:

> With respect to O.S.C.'s motion for clarification, a review of the non-jury decision dated December 22, 2000, and the subsequent order dated January 10, 2001, reflects that both

> orders granted prospective relief only. Prior to the date of our decision of December 22, 2000, there was no adjudication that Zymblosky did not have a lawful right to use the right-of-way due to an ownership interest that he acquired by adverse possession or an easement that he secured by prescription or necessity. Hence, Zymblosky could not be liable for or chargeable with trespass until such time as we found that he had no right to use the tract. Following our decision of December 22, 2000, that he possessed no such right, Zymblosky was liable for trespass and O.S.C. was entitled to receive fair rental damages of $541.66 per month or $6,500.00 per year. Ergo, our earlier decision clearly reflects that Zymblosky was found liable for fair rental damage son a prospective basis only.

(*See* Order dated 1/8/02, pp. 5-6). Thus, we specifically held that "the award of fair rental damages of $541.66 per month or $6,500.00 per year is to have a prospective effect only such that defendants are liable for the same from December 22, 2000, into the future for as long as the trespass continues." (d., p. 6).

On January 14, 2002, O.S.C. appealed our order of January 8, 2002, granting its motion for clarification. The sheriff's sale on O.S.C.'s writ of execution was scheduled for May 14, 2002, and on that date, Judge Carmen D. Minora issued a rule to show cause why Zymblosky's "Motion to Place Monies into Court and Motion for a Continued Stay" should not be granted "until final court determination or settlement is made, including a stay of the sheriff's sale scheduled for Tuesday, May 14, 2002." On June 6, 2002, O.S.C. filed a

"Petition to Strike Defendant's Motion to Place Money into Court and for Stay" and a "Petition to Strike Praecipe to Tender Rental to Clerk of Judicial Records." On that date, O.S.C. secured a rule to show cause and the parties' filings on May 14, 2002, and June 6, 2002, were consolidated for a hearing on July 5, 2002. On that date, Judge Trish Corbett issued an order which stated "No Action taken on this date due to lack of jurisdiction", presumably as a result of the pendency of O.S.C.'s appeal to the Superior Court.

According to the sheriff's schedule of distribution which was filed on July 18, 2002, Zymblosky's property was sole to O.S.C. based upon the writ of execution in the amount of $184,349.26. The sheriff's sale took place on May 14, 2002, and the sheriff's deeds were delivered to O.S.C. on July 17, 2002. On August 5, 2002, Zymblosky filed a "Rule to Show Cause Why Deed Should Not Be Stricken and Voided" after Zymblosky had received notice from O.S.C. on August 2, 2002, to vacate his property or "be subject to criminal prosecution for being a defiant trespasser". Judge Vito P. Geroulo issued a rule to show cause on August 5, 2002, which was made returnable for a hearing on August 27, 2002, and in the interim, he directed that O.S.C.'s "Notice to the defendant to vacate all his real estate (five parcels) is stayed pending hearing." Later that same day, Judge Geroulo vacated his order and directed the parties to present all of their motions "to Judge Nealon who presided on the trial of this matter."

On August 9, 2002, new counsel entered an appearance on behalf of Zymblosky and filed a petition for a "Rule to Show Cause Why Deeds Issued by Sheriff of Lackawanna County Should Not Be Revoked." Over the objection of O.S.C., President Judge Chester T. Harhut entered an order on August 9, 2002, granting a rule to show cause why the sheriff's

deeds should not be stricken. On September 4, 2002, O.S.C. filed preliminary objections to Zymblosky's rule to show cause, and on September 17, 2002, Zymblosky filed preliminary objections to O.S.C.'s preliminary objections. Additionally, on January 17, 2003, O.S.C. filed a "Motion to Strike Defendants' Rule to Show Cause Why Deeds Issued by Sheriff of Lackawanna County Should Not Be Revoked."

On January 24, 2003, the Superior Court of Pennsylvania affirmed our order dated January 8, 2002, granting O.S.C.'s motion for clarification and holding that Zymblosky's rental obligation commenced prospectively on December 22, 2000. *See* O.S.C. Company v. Zymblosky, 819 A.2d 123 (Pa. Super. 2003). By notice dated January 29, 2003, the Court Administrator scheduled Zymblosky's petition to revoke the sheriff's deeds and O.S.C's motion to strike Zymblosky's rule to show cause for oral argument on April 23, 2003. Zymblosky filed an answer to O.S.C.'s motion to strike on February 10, 2003, and following the completion of oral argument on April 23, 2003, these matters were submitted for a decision.

Zymblosky seeks to strike the sheriff's deeds on the basis of fraud or want of authority and avers that the sheriff's sale was predicated on fraudulent or unauthorized grounds in that the praecipe and petition for a judicial sale represented that the amount due by Zymblosky was "in excess of one hundred eighty-nine thousand and 00/00 ($189,000.00) dollars" even though the maximum amount owed as per our clarification order of January 8, 2002, was "ten thousand eight hundred thirty-three and twenty/00 ($10,833.20) dollars." (*See* Defendant's petition ¶10.) Moreover, Zymblosky maintains that his tender of the rental payments to the Clerk of Judicial Records operated as an automatic supersedeas under Pa. R.A.P.

1731 and prevented the sheriff from proceeding forward with the sale. 3135(a) obligated Zymblosky to challenge the sheriff's deeds prior to August 9, 2002. Specifically, O.S.C. posits that the subject parcels were sold at a sheriff's sale on May 14, 2002, and the sheriff's deed was delivered to O.S.C. on July 18, 2002. O.S.C. submits that pursuant to Rule 3135()a, any objection to the sheriff's deeds had to be filed within ten days of the sheriff's filing of the schedule of distribution on July 18, 2002. Since Zymblosky's petition to strike was not filed by July 29, 2002, O.S.C. asserts that it is untimely and must be dismissed.

O.S.C. is correct that a party who is dissatisfied with a sheriff's sale has ten days to either file exceptions to the schedule of distribution or to submit exceptions to the sheriff's execution of a sheriff's deed. *See* Concord-Liberty Savings & Loan Assoc. v. N.T.C. Properties, Inc., 454 Pa. 472, 475-476, 312 A.2d 4, 5 (1973). However, an exception to that rule exists if the sheriff's sale was vitiated by fraud or lack of proper authority, in which case a sheriff's dale may be set aside more than ten days after the sheriff's deed is acknowledged and delivered and the petitioner asserts fraud or want of authority to make the sale. Knox v. Noggle, 382 Pa. 302, 304-305, 196 A.18, 19-20 (1938); Kowatch v. Home Building & Loan Assoc. of Latrobe, 131 Pa. Super. 517, 522, 200 A.111, 113 (1938). *See also* 13 Standard Pa. Practice 2d §76:50 ("...an exception to the rule that an execution sale will not be set aside upon an application made after an acknowledgment and delivery of a sheriff's deed has been made in the case of fraud or want of authority to make the sale" since "a sheriff's deed does not cure irregularities which render the execution void, as where there is a fundamental lack of power in the sheriff to make the sale."). In the event of fraud or lack of authority, an attack may be lodged against a sheriff's sale more than 10 days

after delivery of the sheriff's deed to the purchaser. *See* Garrison v. Erb, 424 Pa. 306, 309, 227 A.2d 848, 849 (1967). *Cf.* Triangle Printing Co. v. Image Quest, 730 A.2d 998, 1002-1003 (Pa. Super. 1999) (a defense based upon irregularities in the proceedings that implicate the authority to act is not foreclosed by subsequent proceedings and a void decree or act can be attacked by any court at anytime).

Instantly, a sheriff's sale was conducted on May 14, 2002, based upon a praecipe for writ of execution that was filed by O.S.C. for an amount in excess of $180,000.00. The sheriff's sale on May 14, 2002, was predicated upon a retroactive award of damages which had *never* been issued by the court. In fact, more than four months prior to the sheriff's sale, this Court entered an order on January 7, 2002, granting O.S.C.'s motion for clarification and confirming that the damages were awarded prospectively from December 22, 2000, into the future. As a consequence, the Lackawanna County Sheriff either lacked the fundamental authority to make a sheriff's sale based upon a clearly erroneous judgment in excess of $180,000.00, or the sale was procured by fraud on the part of O.S.C. in misrepresenting the non-jury award as being retroactive rather than prospective. In either event, the sheriff's deeds may be attacked and stricken more than ten days after the acknowledgment and delivery of the deeds on July 17, 2002. Therefore, O.S.C.'s motion to strike Zymblosky's challenge as untimely is devoid of merit.

As to the lack of a verification under Rule 206.3, we would note that Pa. R.Civ.P. 126 mandates that the Rules of Civil Procedure must "be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable." Under Rule 126, "[t]he court at every stage of any such action or proceeding

may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Id. Inasmuch as the initial lack of a verification did not affect the substantial rights of O.S.C., we will disregard any initial error or defect. Moreover, Zymblosky subsequently cured that technical defect by filing an appropriate verification on March 6, 2003. As such, O.S.C.'s preliminary objections will be denied.

In contrast, Zymblosky's petition to revoke the sheriff's deeds will be granted since the deeds were the product of fraud or want of authority to make the sale based upon a purported judgment in excess of $180,000.00. By virtue of its own admission in its motion for clarification filed on January 12, 2001, and in light of this court's subsequent decision dated January 7, 2002, reaffirming that the rental damages were prospective from December 22, 2000, O.S.C. never had any *bona fide* basis for filing documents of record claiming that the rental and interest payments due and owing totaled $184,349.26. The fictitious judgment amount which served as the premise for the sheriff's sale and deeds clearly renders the sale and deeds invalid on the basis of either fraud or the sheriff's fundamental lack of power to consummate the sale based upon an unauthorized retroactive award. Accordingly, Zymblosky's petition to strike the sheriff's deeds will be granted.[1]

---

1 Since we have granted Zymblosky's petition on this basis, we need not address the supersedeas argument under Pa. R.A.P. 1731. Furthermore, in light of our disposition of the parties' filing son August 9, 2002 and January 17, 2003, plaintiff's petition to dismiss defendants' rule as to why deeds should be revoked, plaintiff's petition to strike defendants' supplemental brief, and plaintiff's request for rule absolute will be

AND NOW, this 20th day of June, 2003, upon consideration of defendants' petition and rule to show cause why deeds issued by Sheriff of Lackawanna County should not be revoked (filed on August 9, 2002) and plaintiff's motion to strike defendants' rule to show cause why deeds issued by Sheriff of Lackawanna County should not be revoked (file don January 17, 2003), the memoranda of law submitted by the parties, and the oral argument of counsel on April 23, 2003, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

1.Plaintiff's motion to strike defendants' rule to show cause why deeds issued by Sheriff of Lackawanna County should not be revoked is DENIED and DISMISSED;

2.Defendants' petition and rule to show cause why deeds issued by Sheriff of Lackawanna County should not be revoked is GRANTED and the sheriff's deeds which were issued, acknowledged and delivered by the Sheriff of Lackawanna County are stricken on the grounds of fraud and want of authority; and

3.Plaintiff's petition to dismiss defendant's rule to show cause, plaintiff's petition to strike defendants' supplemental brief, and plaintiff's request for rule absolute are DISMISSED AS MOOT.

BY THE COURT:

/s/Terrance R. Nealon
Terrence R. Nealon

---

dismissed as moot.

cc: Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. Civ. P. 236(a)(2) by mailing time-stamped copies to:

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Supreme Court, U.S.
FILED
AUG 29 2005
OFFICE OF THE CLERK

No. 05-156

IN THE

Supreme Court of the United States

O.S.C. COMPANY,

Petitioner,

v.

EDWARD G. ZYMBLOSKY, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, HARRISBURG OFFICE

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DOES A STATE COURT DENY A PARTY EQUAL PROTECTION OF THE LAW BY ISSUING A NON-PUBLISHED, NON-PRECEDENTIAL OPINION?

II. DOES A STATE COURT DENY A PARTY EQUAL PROTECTION OF LAW WHEN IT FOLLOWS EXISTING STATUTORY MANDATE AND EXISTING DECISIONAL LAW IN STRIKING A SHERIFF'S DEED IMPROPERLY PROCURED BY SUCH PARTY?

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INTRODUCTION

The Pennsylvania Superior Court did not deny the Petitioner, O.S.C. Company (hereinafter "OSC"), equal protection of the law in affirming the decision of the Lackawanna County, Pennsylvania Court of Common Pleas in an unpublished, non-precedential Opinion which struck a sheriff's deed to real property by virtue of the Lackawanna County, Pennsylvania, Sheriff's lack of authority to conduct the sale and by virtue of OSC's fraudulent procurement of the deed in filing a writ of execution in an amount over twenty-eight times in excess of any record judgment. Interestingly, OSC does not argue that it is being denied equal protection of the law by virtue of a court's refusal to allow OSC to cite to a non-published, non-precedential opinion. Rather, OSC claims that Pennsylvania Supreme and Superior Courts have violated the Fourteenth Amendment to the United States Constitution by issuing a non-published, non-precedential opinion in connection with its decision to cause the sheriff's deed to be stricken. Despite OSC's argument, however, the United States Constitution does not contain an express prohibition against issuing non-precedential opinions. *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001).

Similarly, the Pennsylvania Superior Court did not deny OSC equal protection of the law as it followed existing statutory mandate and existing decisional law in striking the sheriff's deed improperly procured by OSC. Specifically, the Pennsylvania Supreme Court has promulgated Rules of Civil Procedure for use by Pennsylvania courts. Pennsylvania Rule of Civil Procedure 3132, Pa. R.C.P. 3132, establishes the appropriate method for challenging a completed sheriff's sale. The Pennsylvania Superior Court has concluded that a party

to a Rule 3132 proceeding is not entitled to a trial by jury. *S&T Bank by Dalessio v. Dalessio*, 429 Pa. Super. 282, 287, 632 A.2d 566, 568 (1993). Notwithstanding OSC's claims to the contrary, therefore, the Pennsylvania Superior Court did not deny OSC of either due process or equal protection of the law since it correctly applied established law.

Finally, Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 1925(b), requires a party to file a concise statement of matters complained of on appeal when requesting review of a trial court's decision. Any issue not specified in the concise statement of matters complained of on appeal is waived. *See, e.g., Feidler v. Morris Coupling Co.*, 784 A.2d 812, 816 (Pa. Super. 2001).

On appeal to the Pennsylvania Superior Court, OSC advanced the argument that the Lackawanna County Court of Common Pleas deprived it of due process by failing to conduct an evidentiary hearing. However, this issue was never raised by OSC in its concise statement of matters complained of on appeal pursuant to Pa. R.A.P. 1925(b). Accordingly, although not specifically addressed by either the Pennsylvania Superior or Supreme Courts, this issue had been waived by OSC pursuant to the application of Pa. R.A.P. 1925(b).

STATEMENT OF THE CASE

This matter involves the striking of Sheriff's deeds procured by the fraudulent conduct of OSC causing a writ of execution to be issued against property in an amount over 28 times in excess of any record judgment. The matter involves neither an important federal question nor a decision involving an important question of federal law.

On August 25, 1997, OSC commenced an action against Edward G. Zymblosky, Jr., Gail Zymblosky, his wife, and Edward G. Zymblosky, Jr. t/a Boots and Hanks 24-Hour Towing and Wrecking Service (collectively, "Zymblosky") in the Court of Common Pleas of Lackawanna County, Pennsylvania seeking damages for Zymblosky's alleged use and encroachment upon a right of way occupied by OSC (the "Action"). By non-jury decision dated December 22, 2000, the Lackawanna County Court of Common Pleas, Pennsylvania, per the Honorable Terrence J. Nealon, J., entered judgment in favor of OSC and against Zymblosky (the "Non-Jury Decision"). Pursuant to the Non-Jury Decision, the Lackawanna County Court of Common Pleas awarded fair rental damages to OSC in the amount of $6,500 per year, or $541.66 per month. Thereafter, on January 11, 2001, the Court entered an order which, *inter alia*, denied and dismissed exceptions filed by Zymblosky to the Non-Jury Decision (the "Exception Order"). The Exception Order again awarded damages to OSC in the amount of $6,500 per year, or $541.66 per month.

On January 12, 2001, OSC filed a motion for clarification requesting, *inter alia*, that the Court lodge an order clarifying the issue of the date upon which Zymblosky's obligation to pay fair rental damages to OSC began in accordance with the Non-Jury Decision. Notably, the averments advanced by OSC in support of its request for clarification provided, in pertinent part:

> 5. This Court's Order decreed that Defendants unauthorized use of Plaintiff's right-of-way constituted a trespass for which fair rental damages is to be paid by Defendant.

6. The Court's decision and Order does not state the date on which the Defendants obligation to pay the fair rental damages began as a result of the trespass. Without this date, the Plaintiff is unable to calculate a sum certain.

7. Before the Plaintiff can proceed to a final judgment based upon the aforementioned Order, the Plaintiff is obligated to calculate damages based on a sum certain.

8. After review of this Court's Opinion and Order dated December 22, 2000, Plaintiff is unable to calculate Defendants obligation to Plaintiff.

WHEREFORE, the Plaintiff requests this Honorable Court file an Order clarifying the issue of the date upon which Defendants obligation to pay fair rental damages to Plaintiff began. . . .

Subsequent to the filing of the motion for clarification, and prior to any decision on the merits thereto, OSC, on or about August 3, 2001, filed a praecipe for writ of execution in the amount of $184,349.26. Pursuant to the filing of this praecipe, the Lackawanna County Clerk of Judicial Records issued a writ of execution itemizing the costs due as follows:

Amount Due:	$109,958.26
Interest from _____:	74,391.00
TOTAL:	$184,349.26

(The "Writ of Execution.")

On January 8, 2002, the Lackawanna County Court of Common Pleas, per the Honorable Terrence J. Nealon, issued an order in response to OSC's motion for clarification (the "Clarification Order"). The Clarification Order provided, in pertinent part:

> 1. [OSC's] Motion for Clarification is GRANTED and consistent with the reasoning set forth above, the award of fair rental damages of $541.66 per month or $6,500.00 per year, is to have prospective effect only, such that [Zymblosky is] liable for the same from December 22, 2000, into the future so long as the trespass continues; . . .

Although the Clarification Order indicated that the judgment entered pursuant to the Non-Jury Decision was to have prospective effect only, OSC never caused the Writ of Execution to be modified or withdrawn.

Ultimately, an execution sale of the property owned by Zymblosky was held by the Lackawanna County Sheriff on or about May 14, 2002. Thereafter, on or about July 18, 2002, the Lackawanna County Sheriff delivered a deed to OSC conveying title to the property.

On August 9, 2002, counsel for Zymblosky filed a petition pursuant to the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. 206.1 and 3132, seeking a rule to show cause why the deed tendered and delivered by the Sheriff should not be revoked (the "Petition"). After reviewing the Petition, the Lackawanna County Court of Common Pleas, *en banc*, issued a rule upon OSC to appear and show cause why the deed tendered by the Sheriff should not be revoked.

On June 20, 2003, the Lackawanna County Court of Common Pleas, per the Honorable Terrence J. Nealon, issued an order and opinion granting Zymblosky's Petition, striking the Sheriff's deed issued to OSC on the basis of fraud and/or the Lackawanna County Sheriff's want of authority to conduct the sale. Following the issuance of the June 20, 2003 order, OSC filed on appeal to the Pennsylvania Superior Court. The order was affirmed by a panel of the Pennsylvania Superior Court on May 25, 2004.

By order dated August 9, 2004, the Pennsylvania Superior Court denied an application for reargument filed by OSC. Thereafter, by order dated April 26, 2005, the Pennsylvania Supreme Court denied OSC's petition for allowance of appeal.

REASONS FOR DENYING THE PETITION

The decision of the Pennsylvania Supreme Court in denying OSC's petition for allowance of appeal neither decides an important federal question in a way that conflicts with the decision of another state court of last resort or of the United States Court of Appeals, nor decides an important question of federal law that has not been, but should be, settled by the United States Supreme Court. To the contrary, the issues related to the Pennsylvania Supreme Court's denial of OSC's petition for allowance of appeal involve the application of state law. Moreover, OSC's argument that the Pennsylvania Supreme and Superior Courts denied it of equal protection of the law by refusing to provide OSC with an evidentiary hearing was waived by OSC's failure to file a concise statement of matters complained of on appeal in accordance with the Pennsylvania Rules of Appellate Procedure.

I. A STATE COURT DOES NOT DENY A PARTY EQUAL PROTECTION OF THE LAW BY ISSUING AN UNPUBLISHED, NON-PRECEDENTIAL OPINION

Despite OSC's argument to the contrary, a state court does not deny a party equal protection of the law issuing unpublished, non-precedential opinion. In fact, the United States Constitution does not contain an express prohibition against issuing non-precedential opinions. *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001); *Symbol Technologies, Inc. v. Lemelson Medical, Education and Research Foundation, Limited Partnership*, 277 F.3d 1361, 1367 (Fed. Cir. 2002).

While there is non-binding precedent concluding that a rule prohibiting the use of unpublished opinions as precedent is unconstitutional, that precedent relates to the application of Article III of the United States Constitution. *See, e.g., Anastasoff v. United States*, 223 F.3d 898, 899-905 (8th Cir. 2000), *vacated as moot*, 235 F.2d 1054 (8th Cir. 2000). Notably, the issue in *Anastasoff* and its progeny is whether a court can preclude a party from relying upon an unpublished, non-precedential opinion prosecuting its action. *Anastasoff v. United States*, 223 F.3d at 899. In the present case, however, OSC has argued that the Pennsylvania Supreme and Superior courts denied it equal protection of law by merely issuing an unpublished, non-precedential decision in the case at issue. OSC does not argue that it has been denied the ability to rely upon an unpublished, non-precedential decision in the prosecution of its case.

Moreover, dissimilar to *Anastasoff* and its progeny, OSC fails to argue that Section 37 of the Internal Operating

Procedures of the Pennsylvania Supreme Court, 210 Pa. Code § 65.37, is violative of Article III of the United States Constitution[1]. Rather, without citation to any authority, OSC boldly argues that Section 37 violates its rights to equal protection of the law. However, even assuming OSC's argument can be construed as an appropriate Constitutional challenge, the recent trend has been to reject the non-precedential holding of *Anastasoff*. *See, e.g., Hart v. Massanari*, 266 F.2d 1155, 1180 (9th Cir. 2001); *Symbol Technologies, Inc. v. Lemelson Medical, Education and Research Foundation, Limited Partnership*, 277 F.3d 1361, 1367 (Fed. Cir. 2002).

According to the Ninth Circuit Court of Appeals in *Hart v. Massanari*, the United States Constitution does not contain an express prohibition against issuing non-precedential opinions. *Hart v. Massanari*, 266 F.3d at 1163. Rather, "[t]he common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not. . . ." *Id.*, 266 F.3d at 1180; *see also Symbol Technologies, Inc. v. Lemelson Medical, Education and Research Foundation, Limited Partnership*, 277 F.3d 1361, 1367-68 (Fed. Cir. 2002).

Finally, the Pennsylvania Superior Court recently considered whether the issuance of unpublished, non-precedential decisions is violative of the Vesting Clause contained in Article V, Section 1 of the Pennsylvania Constitution which is similar to that contained in Article III to the United States Constitution. *Schaaf v. Kaufman*, 850 A.2d

1. Note that Supreme Court Internal Operating Procedure § 37(B) allows a court panel, *sua sponte*, or any party or the trial judge, upon motion, to convert the memorandum to a published opinion. 210 Pa. Code § 65.37(B) (1992, as amended, 2003).

655, 658-59 (Pa. Super. 2004). According to the Pennsylvania Superior Court, so long as it renders judgments, whether unpublished, binding, citable or not, it is not strayed beyond the judicial powers granted in the Pennsylvania Constitution. *Id.*

II. A STATE COURT DOES NOT DENY A PARTY EQUAL PROTECTION OF THE LAW WHEN IT FOLLOWS EXISTING STATUTORY MANDATE AND DECISIONAL LAW IN STRIKING A SHERIFF'S DEED IMPROPERLY PROCURED BY A PARTY

OSC further argues that it was denied equal protection of the law when the Pennsylvania Superior Court and lower courts withheld the application of voluminous amounts of established case law.[2] In essence, OSC's Petition avers a deprivation of Constitutional rights as a result of the Pennsylvania courts' failure to follow existing state law. As stated by OSC in its Petition, however, the Fourteenth Amendment to the United States Constitution does not assure uniformity of judicial decisions or immunity from judicial error. *Beck v. Washington*, 369 U.S. 541, 554-55, 82 S. Ct. 955, 963, 8 L. Ed. 2d 98, 110 (1962), *rehearing denied*, 370 U.S. 965, 82 S. Ct. 1575, 8 L. Ed. 2d 854 (1962). Accordingly, "[w]ere it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id.*, 369 U.S. at 555, 82 S. Ct. at 963, 8 L. Ed. 2d at 110.

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2. Assuming, *arguendo*, that the Pennsylvania Superior and lower courts improperly applied established case law, Supreme Court Rule 10 provides, in pertinent part:

> . . . A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Notwithstanding OSC's argument to the contrary, the Pennsylvania Superior and lower courts followed existing statutory and decisional precedent in striking the Sheriff's deed.

THE PENNSYLVANIA SUPERIOR AND TRIAL COURTS PROPERLY APPLIED EXISTING STATUTORY AND DECISIONAL PRECEDENT IN REFUSING TO GRANT OSC A TRIAL BY JURY

OSC argues that it was denied equal protection of the law due to the decisions of the Pennsylvania Superior Court and trial court in refusing to grant it a trial by jury. This argument, however, ignores the clear import of Rule 3132 of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. 3132, which sets forth the procedure for a party to set aside a sheriff's sale.[3] In fact, the language of the Rule specifies that "[u]pon petition," the court may, upon proper cause shown, set aside sheriff's sale. Under Pennsylvania law, therefore, the appropriate method for challenging a completed sheriff's sale is for an aggrieved party to file a petition to set aside the sale in accordance with Pa. R.C.P. 3132, rather than in a jury trial. *See Farmer's First Bank v. Wagner*, 455 Pa. Super. 107, 110 n.3, 687 A.2d 390, 392 n.3 (1997).

In *S&T Bank by Dalessio v. Dalessio*, 429 Pa. Super. 282, 632 A.2d 566 (1993), the Pennsylvania Superior Court had the opportunity to consider whether a party to a Rule 3132 proceeding was entitled to a trial by jury. In rejecting one party's claim that she was entitled to a trial by jury to determine the fair market value of property sold at a sheriff's sale in accordance with Pa. R.C.P. 3132, the Pennsylvania Superior Court held:

3. The verbatim text of Pa. R.C.P. 3132 is attached hereto as Appendix A and is incorporated herein.

Nowhere in Rule 3132 is there a reference to the right to a jury trial for matters concerning the setting aside of a sheriff's sale. Thus, we do not agree with Wife's argument that, under Rule 3132, where important real estate rights are involved, a request for a jury trial cannot be summarily denied. Our research has revealed no statute or case which compels the result sought by Wife.

In further support of her argument, Wife cites Article I, Section 6 of the Pennsylvania Constitution, which states:

> Trial by jury shall be as heretofore, and the right remains inviolate.

There are, however, limitations: Where no right to a jury trial existed prior to the adoption of the constitution, no right exists now unless one is specifically created by the legislature. . . . Furthermore, Rule 128(f) of the Pennsylvania Rules of Civil Procedure provides:

> In ascertaining the intention of the Supreme Court in promulgation of a rule, the Court may be guided by the following presumptions among others.
>
> (f) that no rule shall be constructed to confer a right to trial by jury where such right does not otherwise exist.

Pa. R.C.P. 128(f), 42 Pa. C.S.A.

S&T Bank by Dalessio v. Dalessio, 429 Pa. Super. at 287, 632 A.2d at 568 (citations omitted).

As in *S&T Bank by Dalessio v. Dalessio*, no statute or case justified the demand for jury trial made by OSC in the instant proceeding. Moreover, as noted by the *Dalessio* Court, Pa. R.C.P. 128(f) specifically provides that no Rule of Civil Procedure shall be constructed to confer a right to trial by jury where such right does not otherwise exist. Accordingly, despite OSC's assertions that the Pennsylvania trial and Superior Courts withheld the application of established case law, existing statutory and decisional law was followed and applied in this case.

III. OSC HAS WAIVED THE ARGUMENT THAT ITS DUE PROCESS RIGHTS WERE VIOLATED BY VIRTUE OF THE TRIAL COURT'S FAILURE TO GRANT A HEARING

OSC's last argument is that the Lackawanna County, Pennsylvania Court of Common Pleas divested OSC of title to land and refused to give it a hearing. This issue, however, has been waived by OSC's failure to comply with the Pennsylvania Rules of Appellate Procedure. Specifically, Pennsylvania Rule of Appellate Procedure 1925(b) provides:

> (b) **Direction to file statement of matters complained of**. The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

Pa. R.A.P. 1925(b).[4]

4. The verbatim text of Pa. R.A.P. 1925 is attached hereto as Appendix B and is incorporated herein.

Although OSC filed a statement of the matters complained of on appeal, it never included the issue of whether the Lackawanna County Court of Common Pleas deprived OSC of due process of law by failing to provide an evidentiary hearing. Accordingly, under Pennsylvania law, this issue was waived and the Pennsylvania appellate courts were precluded from considering the merits of it on appeal. *See, e.g., Feidler v. Morris Coupling Co.*, 784 A.2d 812, 816 (Pa. Super. 2001).

Notwithstanding the waiver of this argument by OSC, however, the Pennsylvania Superior Court and the Lackawanna County Court of Common Pleas acted appropriately and in accordance with the petition practice specified in the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. 206.1, *et seq.*, in refusing to afford OSC an evidentiary hearing.

Under Pennsylvania law, when the record before the trial court is sufficient, as a matter of law, to dispose of a petition, the court is not required to postpone its decision in order to afford a party the opportunity to conduct depositions on disputed factual issues that are not material to the disposition of the petition. *See Cross v. 50th Ward Community Ambulance Co.*, 365 Pa. Super. 74, 83, 528 A.2d 1369, 1373 (Pa. Super. 1987); *Merriam v. Cedarbrook Realty, Inc.*, 266 Pa. Super. 269, 275, 404 A.2d 407, 409 (1978). In the present case, the record before the Lackawanna County Court of Common Pleas was sufficient, as a matter of law, to justify the granting of Zymblosky's Petition and the setting aside of the May 14, 2002 Sheriff's sale.

Specifically, documents filed of record were all that were necessary to make a determination that the May 14, 2002

Sheriff's sale was improperly prosecuted by virtue of the Lackawanna County Sheriff's lack of authority to conduct the sale and/or OSC's fraudulent and overbearing conduct in causing a writ of execution to be issued in an amount greatly in excess of any record judgment. The December 22, 2000 Non-Jury Decision, the January 11, 2001 Exception Order, the January 8, 2002 Clarification Order and the docket revealed that OSC's judgment was in the amount of $6,500.00 and not $184,349.26 as represented by OSC in its praecipe for writ of execution and the Writ of Execution. The motion for clarification filed by OSC on January 12, 2001 with the Lackawanna County Court indicated that prior to the filing of the praecipe for writ of execution and issuance of the Writ of Execution, OSC was unable to calculate Zymblosky's obligation. Moreover, in its motion for clarification, OSC, by its own admission, was clearly aware that it could not "proceed to a final judgment. . . ."

Even though OSC represented that it could not proceed to final judgment until the trial court identified the date on which Zymblosky's rental obligation began, OSC filed a praecipe for writ of execution on August 3, 2001 in which it represented the judgment as being $184,349.26. Accordingly, the filed documents and statements of record were sufficient, as a matter of law, to justify the setting aside of the May 14, 2002 Sheriff's sale and the trial court was not required to postpone a decision on the matter. *See Cross v. 50th Ward Community Ambulance Co.*, 365 Pa. Super. at 83, 528 A.2d at 1373; *Merriam v. Cedarbrook Realty, Inc.*, 266 Pa. Super. at 275, 404 A.2d at 410.

Since the Lackawanna County Court of Common Pleas and Pennsylvania Superior Court properly applied existing Pennsylvania law, OSC's argument that it was denied due process of law is clearly without merit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 3132. Setting Aside Sale

Upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.

APPENDIX B

Rule 1925. Opinion in Support of Order

(a) General rule. Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.

(b) Direction to file statement of matters complained of. The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

(c) Opinions in matters on petition for allowance of appeal. Upon receipt of notice of the filing of a petition for allowance of appeal under Rule 1112(b) (appeals by allowance), the appellate court below which entered the order sought to be reviewed, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order.